JUDGMENT OF THE GENERAL COURT (Second Chamber)

19 January 2010 *

In Joined Cases T-355/04 and T-446/04,

Co-Frutta Soc. coop., established in Padua (Italy), represented by W. Viscardini and G. Donà, lawyers,

applicant,

v

European Commission, represented initially by L. Visaggio and P. Aalto, and subsequently by P. Aalto and L. Prete, acting as Agents,

defendant,

* Language of the case: Italian.

ACTION in Case T-355/04 for annulment of (i) the decision of the Commission of 28 April 2004 rejecting an initial application for access to information concerning operators registered in the Community as importers of bananas and (ii) the implied decision of the Commission rejecting the confirmatory access application and action in Case T-446/04 for annulment of the express decision of the Commission of 10 August 2004 refusing access to the information,

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 2 December 2008,

gives the following

Judgment

Legal context

1. *Community legislation on access to documents*

1 Under Article 255(1) EC:

'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.'

2 Those principles and those conditions are defined in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

3 Article 2(3) of Regulation No 1049/2001 provides:

'This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

4 Article 4 of Regulation No 1049/2001, concerning exceptions to the right to access, provides:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,

…

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

5 Article 7 of Regulation No 1049/2001, concerning the processing of initial applications, provides:

'1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.'

6 Article 8 of Regulation No 1049/2001, concerning the processing of confirmatory applications, states:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 [EC] and 195 [EC], respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time-limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against

the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

7 Pursuant to Regulation No 1049/2001, the Commission adopted Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), the Annex to which lays down the provisions governing the right of access to documents held by the Commission, which reproduce in essence the above provisions of Regulation No 1049/2001.

2. *Community legislation on the importation of bananas*

8 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) introduced, from 1 July 1993, a common system of imports from third countries.

9 In the context of that system — as implemented, from 1 January 1999, by Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32) — the competent authorities of the Member States are required to forward to the Commission each year the lists of the operators registered with them, together with information relating to the quantities marketed by each of those operators during a reference period, to the volumes covered by the applications made by the operators in the current year and to the quantities actually marketed, as well as the serial numbers of the import licences used (see, in particular, Article 4 of Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6) and Articles 6(2) and 28(2) of Regulation No 2362/98) and certain quarterly statistical and economic information relating, inter alia, to the import licences (see, in particular, Article 21 of Regulation No 1442/93 and Article 27 of Regulation No 2362/98).

10 Each traditional operator has access to tariff quotas up to the individual reference quantities calculated by the competent authorities of the Member States on the basis of actual imports during the given period. Communication of the lists in question enables the Commission to check the information available to the competent national authorities and, in so far as required, to forward the lists to the other Member States with a view to facilitating the detection or prevention of false claims by operators. In accordance with Article 4 of Regulation No 1442/93 and Articles 6 and 28 of Regulation No 2362/98, the Commission must, where appropriate, set a single adjustment coefficient on the basis of the information provided, to be applied by the Member States to the operators' reference quantities.

Background to the dispute

11 The applicant, Co-Frutta Soc. coop., is an Italian undertaking engaged in the ripening of bananas. Through the Italian press, it learned of allegedly fraudulent imports of bananas into the European Community between March 1998 and June 2000 at a reduced tariff on the basis of false import licences.

12 The applicant considers itself affected by those imports because of serious price distortions caused by the placing of additional quantities on the Community market, leading the tariff quota to be exceeded, and claims that the loss suffered will be even greater if it transpires that the imports were made not with false licences but with licences which had been properly issued, but on the basis of false or erroneous reference quantities, which would mean that its own reference quantity had been reduced.

13 By the judgment in Case T-47/01 *Co-Frutta* v *Commission* [2003] ECR II-4441 ('the judgment in *Co-Frutta I*'), the Court dismissed the action which the applicant brought against an initial decision of the Commission partially refusing it access to certain documents concerning the Community rules governing the importation of bananas.

14 The applicant applied — by letter of 20 January 2004 to the Commission's Directorate-General for Agriculture ('DG Agriculture'), received on 21 January 2004 — for access to the list of traditional operators registered during the years 1998, 1999 and 2000, specifying:

(a) the quantity of bananas imported by each operator during the period from 1994 to 1996;

(b) the provisional reference quantity attributed to each operator for the years 1998, 1999 and 2000;

(c) the licences (quantities) issued to each operator during the years 1998, 1999 and 2000 and the corresponding use.

15 By letter of 10 February 2004, the head of Unit B1 of DG Agriculture informed the applicant that the prescribed time-limit for sending a reply to that application had been extended by 15 working days. That letter stated, in addition, that it was impossible to forward the documents referred to in paragraph 14(c) above, since they were 'documents of the national institution not sent to the European Commission'.

16 By letter of 16 February 2004, the applicant told the Commission that it had doubts as to the legality of the extension of the time-limit and asked the Commission to take action immediately on its initial application for access to documents.

17 On 13 April 2004, having received no reply by the expiry of the period as extended, the applicant lodged a confirmatory application pursuant to Article 7(4) of Regulation No 1049/2001 with the Secretariat-General of the Commission.

18 On 28 April 2004, the applicant received a negative response from the Director-General of DG Agriculture to its initial application for access to documents.

19 On 3 May 2004, the applicant sent a new confirmatory application to the Secretary-General of the Commission stating that, by that act, it was withdrawing its application of 13 April 2004.

20 By letter of 27 May 2004 from the head of Unit B2 of the Secretariat-General of the Commission, the time-limit for sending a response to the confirmatory application of 3 May 2004 was extended by 15 working days.

21 On 18 June 2004, the expiry date for the extended period for responding to the confirmatory application of 3 May 2004, the head of Unit B2 informed the applicant, by e-mail, that it was impossible to reply within the prescribed time-limit, whilst promising to reply shortly.

22 On 30 August 2004, the applicant received a letter from the Secretary-General of the Commission dated 10 August 2004 ('the decision of 10 August 2004'). That letter confirmed the substance of the initial decision of the Director-General of DG Agriculture of 28 April 2004 refusing access, but granted partial access to the documents referred to in paragraph 14 above. Appended to the letter was the list of traditional operators registered for the years 1999 and 2000.

Procedure and forms of order sought

23 By applications lodged at the Registry of the Court on 27 August 2004 (Case T-355/04) and 9 November 2004 (Case T-446/04), the applicant brought the present actions.

24 By order of the President of the Second Chamber of the Court of 15 October 2007, the two cases were joined for the purposes of the oral procedure and the judgment.

25 At the hearing on 2 December 2008, the parties presented oral argument and replied to questions put by the Court.

26 The applicant claims that the Court should:

— annul the reply, dated 28 April 2004, to the initial application for access to documents, together with the implied decision of 18 June 2004, refusing the confirmatory application submitted on 3 May 2004 (Case T-355/04); and the decision of 10 August 2004 (Case T-446/04);

— require the Commission, by way of measure of inquiry, to produce all the responses obtained from the Member States following the consultation which it had carried out in connection with the application for access (Case T-446/04);

— order the Commission to pay the costs (Cases T-355/04 and T-446/04).

27 The Commission contends that the Court should:

— dismiss the actions;

— order the applicant to pay the costs.

Law

1. *Admissibility*

Arguments of the parties

28 While not raising a formal objection of inadmissibility as indicated at the hearing, the Commission contends, referring to paragraph 31 of the judgment in *Co-Frutta I*, that, in so far as the action is directed against any measure other than the decision of 10 August 2004, it is inadmissible on the ground that it does not concern an actionable measure for the purposes of Article 230 EC.

29 The applicant claims that its application for annulment of the decision contained in the letter of the Director-General of DG Agriculture refusing the initial application must be held to be admissible. The reply which the Director-General of DG Agriculture provided in connection with the initial application cannot be considered to be a purely preparatory measure separate from the final decision, since the final decision

comprised the reply given to the initial application and the silence following the confirmatory application.

30 In addition, the applicant claims that the two actions, in Cases T-355/04 and T-446/04, must be held to be admissible. According to the applicant, if an express reply to the confirmatory application had been adopted within the time-limits or, in any event, had been received by the applicant sufficiently early in relation to the end of the period for commencing proceedings against the implied refusal, it is certain that the applicant would have challenged solely and exclusively the express measure.

Findings of the Court

31 It is necessary to distinguish the three measures which are the subject of the applicant's action for annulment. The first is the reply to the initial application for access to documents, dated 28 April 2004 ('the letter of 28 April 2004'); the second is the implied decision refusing the confirmatory application ('the implied decision'); the third is the decision of 10 August 2004.

The letter of 28 April 2004

32 It should be pointed out that, according to settled case-law, the fact that a letter has been sent by a Community institution to a person in response to a prior request by that person is not sufficient for that letter to be regarded as a decision within the meaning of Article 230 EC, opening the way for an action for annulment (see Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraph 30 and the case-law cited). Only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment

under Article 230 EC (Joined Cases T-3/00 and T-337/04 *Pitsiorlas* v *Council and ECB* [2007] ECR II-4779, paragraph 58).

33 As regards, more specifically, acts or decisions drawn up in a procedure involving several stages, only measures which definitively lay down the position of the institution on the conclusion of that procedure may be contested by means of an action for annulment. Consequently, measures of a preliminary or purely preparatory nature cannot be the subject of an action for annulment (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10; order in Case T-426/04 *Tramarin* v *Commission* [2005] ECR II-4765, paragraph 25; and order of 17 June 2008 in Case T-312/06 *FMC Chemical* v *EFSA* (not published in the ECR), paragraph 43).

34 The procedure for access to Commission documents, which is governed by Articles 6 to 8 of Regulation No 1049/2001 and Articles 2 to 4 of the Annex to Decision 2001/937, comprises two stages. First, the applicant must send the Commission an initial application for access to documents. In principle, the Commission must respond to the initial application within 15 working days of registration of the application. Subsequently, in the event of a total or partial refusal, the applicant may, within 15 working days of receiving the Commission's initial reply, make a confirmatory application to the Secretary-General of the Commission, to which the Secretary-General must, in principle, respond within 15 working days of registration of that application. In the event of a total or partial refusal, the applicant may institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 230 EC and 195 EC, respectively.

35 According to the case-law, it is clear from Articles 3 and 4 of the Annex to Decision 2001/937, read in conjunction with Article 8 of Regulation No 1049/2001, that the response to the initial application is only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider the position in question (see, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 47).

36 Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, in consequence, capable of being the subject of an action for annulment under Article 230 EC (see, to that effect, *Franchet and Byk* v *Commission*, paragraphs 47 and 48; see also, to that effect and by analogy, the judgment in *Co-Frutta I*, paragraphs 30 and 31). Accordingly, the response to the initial application does not produce legal effects and cannot be held to constitute an actionable measure.

37 It follows that the action brought in Case T-355/04 must be dismissed as inadmissible in so far as it is directed against the letter of 28 April 2004.

The implied decision

38 With regard to the application for annulment of the implied decision, the applicant correctly claims that such a decision was created by the expiry of the period for response. The confirmatory application was submitted by the applicant on 3 May 2004 and registered by the Commission on 4 May 2004. By letter of 27 May 2004, the Commission extended by 15 working days the 15-working day period for responding. The new deadline was 18 June 2004. Accordingly, pursuant to Article 8(3) of Regulation No 1049/2001, the lack of response by the Commission must be held to have created, upon the expiry of the time-limit, a negative response capable of being the subject of an action for annulment.

39 In that regard, it should be borne in mind that lack of legal interest in bringing proceedings constitutes an absolute bar to proceedings, which the Community judicature may raise of its own motion (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 45 and the case-law cited).

40 It should also be borne in mind that, according to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled (see *MCI* v *Commission*, paragraph 44 and the case-law cited).

41 An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible.

42 As the Commission was not in a position to prove — in particular, by producing an acknowledgement of receipt — the date on which the applicant received the letter containing the decision of 10 August 2004, it must be held that, at the time when the action in Case T-355/04 was lodged, the applicant had an interest in bringing proceedings and that, at that date, the action was admissible.

43 However, the interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be likely, if successful, to procure an advantage for the party bringing it (Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42; see also, to that effect, the order in Case T-28/02 *First Data and Others* v *Commission* [2005] ECR II-4119, paragraphs 35 to 38).

44 If the applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the Court on the merits cannot bring him any benefit (*Wunenburger* v *Commission*, paragraph 43).

45 In the present case, it must be held that there is no longer any need to adjudicate in Case T-355/04 in so far as it is directed against the implied decision, since the applicant no longer has an interest in bringing proceedings against that decision because of the adoption of the decision of 10 August 2004, the annulment of which it seeks in

Case T-446/04. By adopting the express decision of 10 August 2004, the Commission has, in fact, withdrawn the implied decision adopted previously.

46 As it is, annulment of the implied decision on grounds of a procedural defect and of the decision of 10 August 2004 for lack of competence could do no more than give rise to another decision identical in substance to the decision of 10 August 2004 (see, by analogy, Case 117/81 *Geist* v *Commission* [1983] ECR 2191, paragraph 7; Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraph 54; and Case T-16/02 *Audi* v *OHIM (TDI)* [2003] ECR II-5167, paragraphs 97 and 98). Moreover, consideration of the action against the implied decision cannot be justified either by the objective of preventing its alleged unlawfulness from recurring in the future, for the purposes of paragraph 50 of the judgment in *Wunenburger* v *Commission*, or by that of facilitating a potential action for damages, since it is possible to attain both those objectives through consideration of the action in Case T-446/04.

47 It follows from all of the foregoing that it is not necessary to adjudicate on the action in Case T-355/04.

2. *Substance*

48 In support of its action in Case T-446/04 against the decision of 10 August 2004, the applicant puts forward essentially four pleas in law: (i) the Commission lacked the power to adopt the decision of 10 August 2004 owing to the infringement of the procedural time-limits laid down in Regulation No 1049/2001 and Decision 2001/937; (ii) failure to state reasons concerning the Commission's endorsement of the position of certain Member States and the contradictory nature of the statement of reasons in the letter of 28 April 2004, constituting an infringement of the rules concerning the consultation of third parties; (iii) failure to state reasons and the erroneous application of the exception concerning the protection of commercial interests, as referred to in the first indent of Article 4(2) of Regulation No 1049/2001, as well as the erroneous

and contradictory nature of the partial refusal of access to certain documents; and (iv) lack of a decision concerning the documents referred to in paragraph 14(c) above.

The first plea: the Commission lacked the power to adopt the decision of 10 August 2004 and infringed the procedural time-limits laid down in Regulation No 1049/2001 and Decision 2001/937

The first part, alleging that the Commission lacked the power to adopt the decision of 10 August 2004

— Arguments of the parties

49 The applicant claims that the decision of 10 August 2004 was adopted even though the Commission had lost the power to examine the confirmatory application. The applicant refers to Article 8(3) of Regulation No 1049/2001.

50 Given that the applicant's confirmatory application was lodged on 3 May 2004 and that the period for responding was extended by the Commission by letter of 27 May 2004, that period expired on 18 June 2004. However, the applicant maintains that the decision of the Secretary-General of the Commission is dated 10 August 2004 and that the applicant did not receive it until 30 August 2004.

51 The applicant maintains that, where a rule provides that silence on the part of the Commission is to be construed as specifically signifying a refusal of the application, against which an action may be brought, that implied refusal constitutes the final decision of the Commission and deprives it of the power to proceed with examination of the application, without there being any need for the rule to make express provision for that loss of competence.

52 The applicant claims that to accept that the Commission still has the possibility of adopting an express decision after adopting an implied decision of refusal would encourage the Commission to ignore the mandatory deadlines fixed by the legislation on access to documents. That would constitute, according to the applicant, a manifest infringement of the principle of legal certainty and would oblige citizens to bring two actions for annulment, one against the implied decision and the other against the express decision — the situation in which the applicant finds itself.

53 The Commission contends that the procedural time-limits laid down in Regulation No 1049/2001 merely have the objective of ensuring that the procedure is followed as quickly as possible so as to enable the applicant to obtain, within a reasonable period, a final decision concerning its application for access. If the time-limits were mandatory, any decision adopted late concerning a confirmatory application would be invalid by reason of the institution's lack of power and this would be the case even where that institution eventually granted access to the documents requested.

54 The Commission points out that any loss caused by failure to meet the deadlines may be taken into account for the purposes of assessing the non-contractual liability of the institution. In any event, failure to meet the deadlines cannot affect the validity of the decision adopted.

— Findings of the Court

55 The Commission is required, during the administrative procedure before it, to observe the procedural guarantees provided for by Community law (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 56, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 128).

56 The period of 15 working days — which may be extended — within which the institution must reply to the confirmatory application, as laid down in Article 8(1) and (2) of Regulation No 1049/2001, is mandatory. However, the expiry of that period does not have the effect of depriving the institution of the power to adopt a decision.

57 If the legislature had intended silence on the part of the institutions to bring about such an effect, specific reference would have been made in the legislation concerned. The Commission rightly relies in that regard on Article 4(3) and (4) and Article 5(6) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23). Regulation No 1049/2001 contains no such provisions.

58 In the field of access to documents, the legislature specified the consequences of failure to comply with the time-limits laid down in Article 8(1) and (2) of Regulation No 1049/2001, by providing, in Article 8(3) thereof, that such failure on the part of the institution is to give the applicant the right to institute judicial proceedings.

59 In that context, the consequences which the applicant wishes to attribute to the Commission's failure to comply with the time-limits laid down in Article 8(1) and (2) of Regulation No 1049/2001 must be considered to be disproportionate. There is no legal principle which results in the administration losing its power to respond to an application, even outside the time-limits laid down for that purpose. The mechanism of an implied refusal decision was established in order to counter the risk that the administration would choose not to reply to an application for access to documents and escape review by the courts, not to render unlawful every decision which is late. On the other hand, the administration is required, in principle, to provide — even late — a reasoned response to every application by a citizen. That approach is consistent with the function of the mechanism of the implied refusal decision, which is to enable citizens to challenge inaction on the part of the administration with a view to obtaining a reasoned response.

60 Contrary to the assertions of the applicant, such an interpretation does not affect the objective pursued by Article 253 EC of protecting the rights of citizens and does not permit the Commission to disregard the mandatory time-limits fixed by Regulation No 1049/2001 and Decision 2001/937. Compensation for any loss occasioned by failure to comply with the time-limits for responding can be sought before the General Court, in the context of an action for damages.

61 In the light of all those considerations, the first part of the first plea must be rejected.

The second part, alleging infringement of the procedural time-limits laid down in Regulation No 1049/2001 and Decision 2001/937

— Arguments of the parties

62 The applicant claims that the Commission infringed the procedural time-limits governing access to documents.

63 In addition, the extension by 15 working days of the period within which the Commission must reply to the confirmatory application — because of the need to consult third parties in connection with certain documents to which access was sought — which was communicated to the applicant by letter of 27 May 2004 is unlawful.

64 According to the applicant, it is solely in the case of complex or bulky applications that the period may be extended by 15 working days, under the second paragraph of Article 2 of the Annex to Decision 2001/937. That provision makes no mention of any

possibility of extending the time-limit, should the Commission have to consult a third party in connection with the application for access.

65 In addition, the applicant relies on Article 5(5) of the Annex to Decision 2001/937, according to which '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply'. The applicant maintains that the Commission is required to adopt a decision, even where the author of the documents concerned is late in replying. Moreover, the Commission undertook a second consultation of the Member States concerned, thereby infringing the Community legislation on access to documents.

66 In its reply, the applicant argues that the time-limits indicated in the provisions mentioned above constitute real obligations for the Commission.

67 The Commission does not contest the compulsory nature of the time-limits laid down in Regulation No 1049/2001 and Decision 2001/937, but contends that the consequences of failure to comply with them are purely procedural and non-substantive.

68 With regard to the argument concerning the failure to comply with Article 5(5) of the Annex to Decision 2001/937, the Commission maintains that the consultation was on this occasion particularly important, given that the third party authors were Member States and that Regulation No 1049/2001 accords them special treatment.

69 Concerning the legality of the decision of 10 August 2004, the Commission also maintains that the Secretary-General did not undertake a new consultation of the Member States after the registration of the confirmatory application. With a view to preparing the response to that application, the staff of the competent departments of

the Secretariat-General merely debated the matter as a whole once again, in particular the results of the consultation organised by DG Agriculture.

— Findings of the Court

70 An institution which receives a request for access to a document originating from a Member State must, once that request has been notified by the institution to the Member State, immediately commence, together with that Member State, a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time-limits laid down in Articles 7 and 8 of that regulation, under which it is required to decide on the request for access (Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389; 'the judgment of the Court of Justice in *IFAW*', paragraph 86). Article 8 of Regulation No 1049/2001 therefore requires the Commission to comply with the mandatory time-limit of 15 working days — if appropriate, as extended — even where a third party is consulted.

71 None the less, failure to comply with the time-limit laid down in that provision does not lead automatically to the annulment of the decision adopted after the deadline (see, by analogy, Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Others* v *Commission* [2003] ECR II-1209, paragraphs 167 to 170). The annulment of a decision solely because of failure to comply with the time-limits laid down in Regulation No 1049/2001 and Decision 2001/937 would merely cause the administrative procedure for access to documents to be reopened. In any event, compensation for any loss resulting from the lateness of the Commission's response may be sought through an action for damages.

72 With regard to the lawfulness of the extension of the period for responding, the second paragraph of Article 2 of the Annex to Decision 2001/937 provides that the period may be extended in the event of a complex application. The number of documents requested and the diversity of their authors — the factual situation in the present case — are factors to be taken into account in the classification of an application for access to

documents as complex. In that regard, the Commission informed the applicant of the need to extend the period, in accordance with the legislation in force. The argument that the extension of the period was unlawful must therefore be rejected.

73 In addition, with regard to the argument concerning the second consultation of the Member States by the Commission, the applicant has not submitted any evidence showing that the Commission undertook such a consultation between the refusal of the initial application and the express refusal of the confirmatory application. That argument must therefore be dismissed.

74 Consequently, the first plea must be rejected as unfounded.

The second plea: failure to state reasons concerning the Commission's endorsement of the position of certain Member States and infringement of the rules concerning the consultation of third parties

The first part, alleging failure to state reasons concerning the Commission's endorsement of the position of certain Member States

— Arguments of the parties

75 The applicant claims that, pursuant to Article 5 of the Annex to Decision 2001/937, concerning documents which the Commission holds but which originate from a third party, it is for the Commission to determine whether the exceptions provided for in Article 4 of Regulation No 1049/2001 apply. The Commission should have indicated which of the arguments upon which it relied were taken from the remarks made by the third parties consulted and, where it did not agree with those remarks, it should have formulated relevant criticisms. According to the applicant, it is not enough for

the Member States to state their refusal to disclose documents: they must explicitly take a position on the exceptions upon which they rely.

76 The applicant asks the Court to order the Commission, by way of measure of inquiry under Article 65(b) of the Rules of Procedure of the Court, to produce — in order to examine the scope of the statements made by the Member States, as well as the Commission's assessment of those statements — all the responses provided by the Member States upon which it had based its decision.

77 The Commission contends, with regard to its endorsement of the refusal by the majority of Member States to disclose, that in accordance with the line of authority established by the Court in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2004] ECR II-4135 ('the judgment of the General Court in *IFAW*'), paragraphs 58 and 59, opposition by a Member State, even if no reasons are given, 'does constitute an instruction to the institution not to disclose the document in question'.

78 The Commission therefore contends that the applicant's requests for measures of inquiry are without purpose, since the refusals by the Member States to disclose are of no interest, given that they do not have to be accompanied by a statement of reasons and they are binding upon the Commission.

— Findings of the Court

79 In the judgment of the Court of Justice in *IFAW*, the decision to refuse access to the documents held by the Commission, which was adopted solely on the basis of the Member States' objection to disclosure, was annulled.

80 The Community legislature — in particular, by the adoption of Regulation No 1049/2001 — abolished the 'rule of the author' which had until then prevailed. Against that background, it must be conceded that to interpret Article 4(5) of Regulation No 1049/2001 — which provides that a Member State may request an institution not to disclose a document originating from that State without its 'prior agreement' — as conferring on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a Community institution simply because it originates from that Member State, is not compatible with the objectives of Regulation No 1049/2001 (the judgment of the Court of Justice in *IFAW*, paragraph 58).

81 Indeed, the institution concerned cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. Where, despite an express request to that effect by the institution concerned to the Member State, the Member State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for (the judgment of the Court of Justice in *IFAW*, paragraph 88).

82 Accordingly, where the opposition by one or more Member States to disclosure of a document does not fulfil that requirement to state reasons, the Commission may decide, independently, that one or more of the exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001 applies to the documents covered by an application for access.

83 In the present case, although the Commission has in fact invoked the objections raised by certain Member States to disclosure of some of the documents requested, it based its refusal to disclose them on the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, as indicated in point 4 of the decision of 10 August 2004. Accordingly, the alleged failure to state reasons concerning the Commission's endorsement of the refusal by certain Member States cannot lead to the annulment of the decision of 10 August 2004.

84 Consequently, the part alleging failure to state reasons for the Commission's endorsement of the position of certain Member States must be rejected.

The second part, alleging infringement of the rules concerning the consultation of third parties

— Arguments of the parties

85 According to the applicant, the Director-General of DG Agriculture indicated in the decision referred to in the letter of 28 April 2004 — after extending the period for responding because of the alleged need to consult Member States and citing the explicit opposition of certain Member States as the reason for refusing access — that the response would have been negative in any event, since the documents requested are among those to which access cannot be authorised because of the exception provided for in Article 4(2) of Regulation No 1049/2001. The applicant argues that, if the Commission was convinced since the beginning of the procedure that it was unable to give access to the documents concerned because of the exception referred to in Article 4(2) of Regulation No 1049/2001, it should not have consulted the Member States.

86 The applicant refers to paragraph 56 of the judgment of the General Court in *IFAW*, which states that 'the Commission's duty to consult third parties under Article 4(4) of Regulation No 1049/2001 does not affect its power to decide whether one of the exceptions provided for in Article 4(1) and (2) of the regulation is applicable', to support its claim that Article 4(4) of Regulation No 1049/2001 prohibits consultation of the third party where it is clear that the document must, or must not, be disclosed.

87 The Commission states that the contested decision clearly indicates that there were two cumulative reasons for the refusal of access: the objections raised by the Member

States and, in any event, the exception concerning protection of the commercial interests of operators.

88 The Commission contends that there was no erroneous application of the rules governing the consultation of third parties. It states that the Court has held on numerous occasions that the Member States enjoy special treatment with regard to the regime established by Regulation No 1049/2001, since, in accordance with Article 4(5) thereof, the Community institutions are required not to disclose documents originating from a Member State without its prior agreement. According to the Commission, it cannot be criticised for consulting the Member States responsible for authorship of the documents to which the applicant wished to have access, despite the fact that it considered itself under a duty not to disclose the documents concerned because of the exception concerning protection of the commercial interests of traditional operators.

89 The Commission contends that, even if it must be held that the Member States were consulted unlawfully, that is not sufficient to invalidate the refusal of access, since that refusal remains completely well founded because of the other exception relied upon, concerning protection of the commercial interests of operators.

— Findings of the Court

90 It is settled case-law that the Commission can combine consultation of Member States with reliance upon one of the exceptions provided for in Article 4 of Regulation No 1049/2001 (Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 61; Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289,

paragraph 114; and Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 40).

91 The Court of Justice held in its judgment in *IFAW* that, even where Member States oppose disclosure of a document, the Commission must, in order to refuse access to the documents requested, invoke on its own initiative one of the exceptions provided for in Article 4(1) to (3) of Regulation No 1049/2001 (the judgment of the Court of Justice in *IFAW*, paragraphs 68 and 99).

92 Even if it were to be assumed that the consultation of the Member States by the Commission was unlawful, that circumstance is without relevance to the question whether reliance on the exception relating to protection of the commercial interests of third parties — which is, moreover, the subject of the third plea — is well founded.

93 Accordingly, the two reasons put forward by the Commission cannot be held to be contradictory and the second part of this plea must be held to be unfounded.

94 This plea must therefore be rejected as unfounded.

The third plea: failure to state reasons and erroneous application of the exception concerning the protection of commercial interests, as referred to in the first indent of Article 4(2) of Regulation No 1049/2001, as well as the erroneous and contradictory nature of the partial refusal of access to certain documents

The first part, alleging failure to state reasons concerning the application of the first indent of Article 4(2) of Regulation No 1049/2001.

— Arguments of the parties

95 The applicant observes that the contested decision merely paraphrases Article 4(2) of Regulation No 1049/2001, without explaining the reason why the Commission considers that disclosure of the documents requested would undermine the commercial interests of the operators concerned. The applicant claims that this constitutes an infringement of the fourth paragraph of Article 2 of the Annex to Decision 2001/937, and, more generally, of the obligation under Article 253 EC to state reasons.

96 Referring to the case-law of the Court of Justice and of the General Court, the applicant claims that the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The applicant infers from this that the Commission must give a summary exposition of the reasons why it considers that the exception concerning the protection of commercial interests applies, and that the Commission cannot merely invoke the exception without providing reasons. According to the applicant, the case-law requires the Commission to state, at least for each category of documents requested, specific reasons designed to enable an addressee of a decision refusing access to assess whether that decision is well founded.

97 The Commission contends that the contested decision expressly mentions the reason for refusal, in so far as it states that disclosure of the documents concerned could 'undermine the commercial interests of operators, since they would make public the reference quantities attributed to each operator as well as the quantities actually imported by each operator', while it was not possible to identify any public interest linked with disclosure of the documents.

98 The Commission maintains that knowledge of the quantities of bananas imported by each operator makes it possible to determine the volume of actual activity of each operator and to predict their future business performance. That type of information is considered by the Commission to concern the undertaking's commercial relationships and is not public. The Commission contends that the applicant, which has business on the banana market, cannot reasonably claim to be unaware of the reason why the Commission referred to commercial harm to the operators concerned. The Commission relies by way of evidence on the fact that, when invoking an erroneous application of that exception, the applicant produced ample arguments on the substance.

— Findings of the Court

99 According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution responsible for authorship of the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review (judgment of 30 January 2008 in Case T-380/04 *Terezakis* v *Commission* (not published in the ECR), paragraph 70).

100 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-41/00 P

Interporc v *Commission* [2003] ECR I-2125, paragraph 55 and the case-law cited, and *Terezakis* v *Commission*, paragraph 70).

101 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby defeating the very purpose of the exception (*Terezakis* v *Commission*, paragraph 71).

102 In the present case, the Commission clearly indicated that, independently of the position of the Member States, the exception upon which the Commission based its refusal is that provided for in the first indent of Article 4(2) of Regulation No 1049/2001. That is in accordance with the judgment of the Court of Justice in *IFAW* (paragraphs 68 and 99).

103 In addition, as the applicant has correctly pointed out, the Commission actually adopted a succinct statement of reasons closely reflecting the words of the first indent of Article 4(2) of Regulation No 1049/2001.

104 However, the decision of 10 August 2004, adopted in response to the confirmatory application for access to documents, is a document of five pages which sets out a clear analysis. In point 4 of that decision, the Commission maintains that, in its decisional practice, it has consistently considered that reference quantities and the quantities actually imported by operators constitute information which cannot be disclosed, because its disclosure could undermine the commercial interests of the operators. The Commission states that that information consequently falls under the first indent of Article 4(2) of Regulation No 1049/2001. In point 5 of that decision, the Commission explains that it wished to confirm its analysis by consulting the Member States responsible for authorship of the documents concerned. Since a large majority of those Member States confirmed the Commission's findings concerning the risk of undermining the commercial interests of the operators concerned, the Commission refused access to any of the documents requested which originated in the Member

States opposed to disclosure, pursuant to Article 4(5) of Regulation No 1049/2001. The Commission moreover considered, in point 7 of the decision of 10 August 2004, that the applicant's interest in obtaining access to the documents requested could not be regarded as constituting an overriding public interest.

105 Since the decision of 10 August 2004 clearly reveals the Commission's reasoning, it would be excessive to require a specific statement of reasons for each of the assessments on which that reasoning is based. It should also be observed that certain information cannot be communicated without jeopardising the effective protection of the commercial interests of other operators (see, by analogy, Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraphs 108 and 109).

106 The applicant, a traditional operator on the market for the importation of bananas into the Community, asked for access to very specific documents concerning the import activities of its competitors. As is apparent from the list of operators to which the Commission granted access for the years 1999 and 2000, the applicant requested the disclosure of information concerning the imports of 622 competitor undertakings established in 15 Member States. The Commission stated, in point 4 of the decision of 10 August 2004, that disclosure of the documents concerned could 'undermine the commercial interests of operators, since they would make public the reference quantities attributed to each operator as well as the quantities actually imported by each operator'. It is clear that the quantities imported go to the very heart of the activity of undertakings active on the market in banana imports.

107 It follows that the applicant was placed fully in a position to understand the reasons for refusal which were raised against it, as was the Court to exercise its power of review. Accordingly, the decision of 10 August 2004 is not vitiated by breach of the obligation to state reasons.

108 The first part of the third plea must therefore be rejected.

The second part, concerning the erroneous application of the exception referred to in the first indent of Article 4(2) of Regulation No 1049/2001

— Arguments of the parties

109 The applicant claims that the conditions for applying Article 4(2) of Regulation No 1049/2001 are not met.

110 It points out that the general principle of granting the public the widest possible access to documents held by the Commission, recognised by the case-law of the Court, requires that any exception be interpreted restrictively.

111 The applicant considers that, in the banana sector, the Commission does not exercise the traditional role of a supervisory body protecting competition, but in fact itself determines — through review and comparison of information forwarded by the Member States — the share of the market to go to each operator. More transparency is therefore required of the Commission than in other sectors.

112 According to the applicant, disclosure of the documents requested cannot undermine the commercial interests of other operators, since the banana trade sector constitutes a strictly regulated market in the context of the common organisation of the market in bananas, which means that other operators cannot claim any loss concerning the confidentiality of business information.

113 The applicant maintains that knowledge of the information requested cannot constitute a means of obtaining an unfair competitive advantage, but merely enables it to obtain the means necessary to protect its own interests.

114 Moreover, it claims that this marks the point beyond which the exceptions to disclosure can no longer apply, given that Article 4(7) of Regulation No 1049/2007 provides that '[t]he exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document'. Thus, the applicant states that it could not derive a competitive advantage from the documents concerned, since they relate to a period falling 4 to 10 years prior to the date on which it made its application.

115 The applicant relies, in addition, on overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 to justify the disclosure of documents which would otherwise be covered by the exception. That interest lies in the importance of uncovering abuse on the part of its competitors, in order to ensure the smooth operation of the common organisation of the market in bananas.

116 The applicant considers that the exception on which the Commission's refusal is based cannot be relied on: the only operator to suffer harm is the applicant, which, if it is unable to have access to the documents requested, will be unable to establish the existence of any fraud concerning banana imports.

117 The Commission contends that the information requested by the applicant is directed linked to the activity of each operator and thus incontestably falls within the notion of commercial interests referred to in the first indent of Article 4(2) of the regulation. The fact of operating within the framework of tariff quotas does not rule out the possibility that disclosure of the commercial activities of each operator could cause them harm.

118 The Commission contends that its role is limited to establishing the conversion coefficient applicable to all the reference quantities determined by the Member States where the sum of those quantities exceeds the total of the quantities available within the framework of the tariff quotas. Accordingly, it is not under any specific obligation.

119 The Commission contends that it was not necessary to provide specific reasons for each category of documents to which access was requested, given that the grounds for refusal did not vary.

120 In addition, the Commission considers that the age of the documents requested in no way affects the extremely sensitive nature of the commercial interests protected and refers, by way of example, to the protection accorded to the Communities' historical archives, which may be for more than 30 years. It adds that the information from 1994 to 1996 served as the basis for determining the reference quantity for traditional operators in connection with the arrangements for importing bananas currently in force and that the information from 1999 and 2000 is too recent for it not to benefit from such protection.

121 The Commission contends that it is impossible to consider disclosure of the documents requested as being in the public interest. It states that the applicant is free to initiate a civil action within the criminal proceedings brought in respect of the alleged fraudulent activities and states that, in the context of judicial proceedings, it is ready to provide the competent authorities with all the documents requested from it.

— Findings of the Court

122 According to settled case-law, the exceptions to document access fall to be interpreted and applied strictly so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 36; see also, by analogy, Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraph 66).

123 Moreover, the examination required for the purpose of processing a request for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify the application of that exception (see, to that effect and by analogy, *Denkavit Nederland* v *Commission*, paragraph 45). In principle, application of the exception can be justified only if the institution has previously determined, first, that access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, that there is no overriding public interest justifying disclosure of the document concerned.

124 A specific, individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess whether it is possible to grant the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the Code of conduct on public access to Council and Commission documents (OJ 1993 L 340, p. 41), the Court has moreover already rejected as insufficient an assessment relating to documents which is carried out by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 46; Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121 paragraph 73; and *Franchet and Byk* v *Commission*, paragraph 117).

125 It is in the light of those principles that it is appropriate to consider the application by the Commission of Article 4 of Regulation No 1049/2001 in order to refuse access to the documents requested.

126 In accordance with the first indent of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine protection of the commercial interests of a specific natural or legal person, unless there is an overriding public interest in disclosure.

127 In the present case, the Commission relied on the exception concerning the undermining of the commercial interests of the operators in order to refuse access to the lists specifying, for each operator, the quantity of bananas imported during the period 1994 to 1996 and the provisional reference quantity attributed, for the years 1999 and 2000, whilst pointing out, in the last paragraph of point 3 of the decision of 10 August 2004, that, for the purposes of Regulation No 2362/98, no list of traditional operators exists for the year 1998.

128 First of all, it should be noted that those documents contain confidential information concerning banana importing companies and their commercial activities and must accordingly be considered to fall within the scope of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

129 Secondly, as regards the question whether the Commission examined whether disclosure of the documents concerned would specifically and actually undermine the protected interest — which the applicant disputes, relying on the general nature of the justification put forward in the decision of 10 August 2004 — it should be borne in mind that the Commission stated in point 4 of the decision that disclosure of the documents could 'undermine the commercial interests of operators, since they would make public the reference quantities attributed to each operator as well as the quantities actually imported by each operator'.

130 It is, in principle, open to the Commission to base its decisions in that regard on general presumptions which apply to certain categories of document, since considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. It is nevertheless incumbent on the Commission to determine in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose (see, by analogy, *Sweden and Turco* v *Council*, paragraph 50).

131 The documents at issue in the present case concern two specific factors in the common organisation of the market in bananas: for each traditional operator, the quantities of bananas imported and the quantities which the operator is authorised to import. That information enables the commercial activity of the undertakings importing bananas into the Community to be determined. It is difficult to imagine how the Commission could have set out a specific, individual examination of each document without presenting the figures concerned. It must be stated, moreover, that — as is apparent from the list of operators to which the Commission granted access — the applicant is seeking, for the years 1999 and 2000, disclosure of information concerning the imports made by 622 competitor undertakings established in 15 Member States. A specific, individual examination concerning each of those figures, or even concerning each list sent by each Member State, would not enable reasons to be given justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and thereby defeating the very purpose of the exception (see, by analogy, *WWF UK* v *Commission*, paragraph 65).

132 With regard to the applicant's argument that disclosure of the documents requested cannot undermine the commercial interests of other operators, since the banana trade sector does not constitute a market open to free competition, it must be held that, according to that line of argument, no document concerning the common organisation of the market would fall within the scope of the first indent of Article 4(2) of Regulation No 1049/2001. Moreover, even within a common organisation of the market, the disclosure of provisional reference quantities and their actual use can undermine the commercial interests of the undertakings concerned, since that information makes it possible to determine in the abstract the maximum volume of operators' activities, as well as the actual volume of activity, and to assess the competitive position of those operators, together with the success of their commercial strategies.

133 Moreover, it is necessary to determine whether that risk must, as the applicant claims, be weighed against an overriding public interest (*Sweden and Turco* v *Council*, paragraph 67, and Case T-166/05 *Borax Europe* v *Commission* [2009] not published in the ECR, paragraph 51; see also paragraph 124 above). The aim behind the application for access to the documents is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objectives, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an 'overriding public interest' which prevails over the protection of the commercial interests of traditional operators, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators, but for the competent Community and national public authorities, where appropriate following an application made by an operator.

134 In addition, the applicant relies on Article 4(7) of Regulation No 1049/2001 and claims that the quantities imported from 1994 to 1996 and from 1998 to 2000 should no longer benefit from protection.

135 Article 4(7) of Regulation No 1049/2001 provides:

'The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

136 It follows from that provision that documents the disclosure of which would undermine commercial interests benefit from special protection, since access to them may be prohibited for a period of more than 30 years. However, such protection must, in any event, be justified in the light of the content of those documents.

137 The documents to which access is requested go to the heart of the importing business, since they indicate the market shares, commercial strategy and sales policy of the undertakings in question. The content of those documents thus justifies a period of protection.

138 It follows from Articles 3 and 4 of Regulation No 2362/98 and Article 1 of Commission Regulation (EC) No 250/2000 of 1 February 2000 on imports of bananas under the tariff quotas and of traditional ACP bananas, and fixing the indicative quantities for the second quarter of 2000 (OJ 2000 L 26, p. 6), that, for traditional operators, actual imports between 1994 and 1996 served as the basis for determining the reference quantities for the years 1999 and 2000. Thus, even imports carried out in 1994 had a direct influence on the reference quantities for the year 2000.

139 The date which must be singled out for the purposes of reviewing the lawfulness of the Commission decision is that of its adoption. On 10 August 2004, the Commission's examination concerned documents dating from four years earlier. In that way, since the figures from 1994 influence those for 2000 and the refusal of access dates from 2004, a period of four years must be regarded as a period during which protection of the commercial interests concerned is justified.

140 The application by the Commission of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 must accordingly be considered to be justified.

141 The second part of the third plea must therefore be rejected.

The third part, alleging that the partial refusal of access to certain documents was erroneous and contradictory

— Arguments of the parties

142 The applicant claims that the decision of 10 August 2004 is also unlawful in the light of the principle of proportionality, according to which the institutions have a duty to ensure partial access to documents requested where full access is not possible.

143 The applicant also refers to Article 4(6) of Regulation No 1049/2001, which expressly provides that, if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document are to be released. The applicant maintains that that principle of partial access applies also if an application concerns a number of documents.

144 The applicant infers from this that the Commission should in any event have granted it access to documents from Member States which did not raise objections to disclosure of the documents requested, namely the Republic of Austria, the Hellenic Republic, the Kingdom of Sweden, the Kingdom of Denmark and the Grand Duchy of Luxembourg. It accuses the Commission of treating the case superficially, since it was not until the stage of the defence that the Commission stated that the last two Member States were in favour of the documents being disclosed.

145 The Commission contends that its decision of 10 August 2004 in fact guaranteed the applicant partial access to the documents requested, since that decision was sent to the applicant with the list of traditional operators registered in the Community for the year 2000, which is identical to that for the year 1999. In those circumstances, the present part has now become devoid of purpose.

146 With regard to the applicant's application for partial access to the documents from the Member States which are not opposed to disclosure, the Commission notes that those documents, as indicated in the decision of 10 August 2004, fall within the exception concerning protection of the commercial interests of operators and cannot therefore be disclosed. The fact that the Member States responsible for authorship of the documents concerned have raised no objection is not, in itself, a sufficient reason for the Commission to authorise their disclosure.

— Findings of the Court

147 It should be pointed out that the Commission did in fact give the applicant access to some of the documents referred to in paragraph 14 above — that is to say, the list of traditional operators registered for the year 2000, which is identical to that for the year 1999 — without, however, specifying the quantities imported by each traditional operator between 1994 and 1996. The Commission contends that there is no list of traditional operators for the year 1998.

148 With regard to the documents from Member States which are not opposed to their disclosure, it should be borne in mind that the Commission relied, independently, on the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001. In that regard and in the light of the examination of the second plea, the decision of 10 August 2004 is explained by the fact that the nature of the information contained in the documents requested is identical, irrespective of which Member State is the origin of the document; that is to say, the information consists in the figures corresponding to the quantities imported by each operator during the period from 1994 to 1996 and to the provisional reference quantity attributed to each operator for the years 1999 and 2000. The finding that the disclosure of that information would undermine the commercial interests of the other banana importing undertakings is thus valid for all the documents from the Member States.

149 The third part of the third plea must therefore be rejected and, accordingly, the third plea must be rejected in its entirety.

The fourth plea: lack of a decision concerning the licences

Arguments of the parties

150 The applicant disputes point 2 of the decision of 10 August 2004, by which the Commission expressly refuses access to the documents referred to in point (c) of the initial application.

151 The applicant disputes the Commission's contention that it was not in possession of the import licences issued to each operator during the years 1998, 1999 and 2000 or proof of their use. The applicant refers to the judgment in *Co-Frutta I*, paragraphs 44 and 45, which, it claims, established that at least the documents concerning the period from 1998 to 1999 were sent to the Commission by the Member States.

152 The Commission contends that it does not have the documents referred to in point (c) of the initial application. It states that the only information sent to it by the Member States pursuant to Regulation No 2362/98 was in the form of global data on the use of import licences from the years 1998, 1999 and 2000 and not individual data for each operator. Moreover, there is no data for 1998, since the definition of traditional operator did not exist under Regulation No 1442/93, then in force.

153 The Commission contends that it cannot be inferred from the judgment in *Co-Frutta I* that it was in possession of the documents referred to in point (c) of the initial application.

Findings of the Court

154 The Commission has consistently stated that it was not in possession of the documents referred to in point (c) of the initial application, that is to say, the licences issued to each operator in the course of the years 1998, 1999 and 2000 and the corresponding uses.

155 In accordance with the case-law of this Court, a presumption of legality attaches to any statement made by the institutions relating to the non-existence of documents requested. That is, however, a simple presumption which the applicant may rebut in any way on the basis of relevant and consistent evidence (see Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 29 and the case-law cited, and *Terezakis* v *Commission*, paragraph 155). That presumption must be applied by analogy where the institution declares that it is not in possession of the documents requested.

156 With regard to the only evidence relied on by the applicant, an inference from the judgment in *Co-Frutta I*, it should first be stated that the information referred to in that judgment concern exclusively the years 1998 and 1999. Next, as regards the year 1998, paragraph 46 of that judgment establishes that under Article 4(4) and (5) and Article 21 of Regulation No 1442/93 the Member States are to notify to the Commission the lists of all the registered operators, as well as global data concerning the quantities relating to import licences issued and those relating to licences used, collected on a quarterly national basis, and by operator category. Accordingly, the individual data are not submitted to the Commission under those provisions. As regards the year 1999, reference is made in paragraph 46 of the judgment in *Co-Frutta I* to Regulation No 2362/98. However, as regards the traditional operators, Article 28(2)(a) of Regulation No 2362/98 states that the Member States are to send the Commission the lists of operators, with the specification, for each traditional operator, of the quantity of bananas imported during the years 1994 to 1996 and of their provisional reference quantities. This means that those documents do not contain the information referred to by the applicant in point (c) of the initial application.

157 It follows that, in the absence of relevant and consistent evidence to the contrary, the Commission's statement — to the effect that it is not in possession of the documents referred to point (c) of the initial application — must be regarded as correct (see, to that effect and by analogy, *Terezakis* v *Commission*, paragraphs 162 to 167).

158 The plea must therefore be rejected as unfounded and, accordingly, the action must be dismissed in its entirety.

159 Lastly, with regard to the measures of inquiry sought by the applicant, it follows from the documents in the case-file and from all the foregoing that those measures would serve no purpose in relation to the outcome of the dispute. Consequently, the claim that the Court should order measures of inquiry must be rejected.

Costs

160 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Declares that there is no need to adjudicate on the action in Case T-355/04;

2. Dismisses the action in Case T-446/04;

3. Orders Co-Frutta Soc. coop. to pay the costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 19 January 2010.

[Signatures]